

146012-1
Calhoun



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Environmental Health Research & Testing, Inc.
File: B-246601
Date: March 10, 1992

Andrew B. Katz, Esq., and Dennis J. Riley, Esq., Elliot, Bray & Riley, for the protester.
Lester Edelman, Esq., the Department of the Army, for the agency.
Tania L. Calhoun and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid that acknowledges all amendments to a solicitation, but contains a previous version of the bid schedule, which was modified by a later amendment to increase the quantity of an option item, is nonresponsive where the bid offers a unit and total price for the original lesser quantity but fails to include a price for the increased quantity, since the bid does not represent a clear commitment to furnish the increased quantity at a specified price.

DECISION

Environmental Health Research & Testing, Inc. (EHRT) protests the award of a contract to Exceltech/RESNA under invitation for bids (IFB) No. DACA05-91-B-0111, issued by the Department of the Army, Corps of Engineers, for the removal of underground storage tanks at Golden Gate National Recreation Area, California. EHRT's bid was rejected as nonresponsive because, while EHRT acknowledged all amendments, it failed to bid on additional or revised line items contained in an amended bid schedule.

We deny the protest.

The IFB was issued on August 20, 1991, with a bid opening date set for September 19. The IFB contained a bid schedule calling for bids on base and option items, and provided that bids would be evaluated, for award purposes, by adding the total price for all the options to the total price for the basic requirement. The IFB also provided that failure to submit bids on all individual items on the bid schedule

would render the bids nonresponsive. Prior to bid opening, the Army issued three amendments to the solicitation. This protest concerns amendment No. 2, which increased the required quantity of option item No. 7--soil tests--from 50 to 100, and added to the bid schedule a new option item No. 11, overexcavation of soil (2,000 cubic yards). Amendment No. 2 included a new bid schedule to reflect these additional requirements.

Four timely bids were received in response to the IFB, and EHRT was the apparent low bidder at a price of \$806,820. Exceltech/RESNA was next low with a bid price of \$1,328,103. The Army asked EHRT to verify its bid prices, and EHRT did so in writing on September 27. Before making award to EHRT, the Army discovered that while EHRT had acknowledged all three amendments, it submitted part of its bid on the wrong bid schedule. Specifically, EHRT's bid included page B-7 from the bid schedule of amendment No. 1 instead of page B-7 from the revised bid schedule of amendment No. 2. As a result, EHRT based its bid for option item No. 7 on the wrong quantity of soil tests (50 instead of 100) and submitted no bid at all for the new option item No. 11 (overexcavation of soil--2,000 cubic yards). In a letter dated October 29, the Army informed EHRT that its bid had been rejected as nonresponsive. That same day, the Army awarded the contract to Exceltech/RESNA. This protest followed.

EHRT contends that the Army's rejection of its bid was improper because the firm's failure to bid on the added requirements constituted a minor informality that could be easily identified and corrected based on other information and prices in its bid, including the acknowledgement of all amendments.

We find that the Army properly found the protester's bid nonresponsive because of its failure to bid on the increased requirements of option item No. 7. To be responsive, a bid must represent, at bid opening, an unequivocal offer to comply with the amended IFB's material terms, which include the requirement for a firm, fixed price. Huff & Huff Serv. Corp., B-233740.5, Feb. 9, 1990, 90-1 CPD ¶ 167. The requirement for fixed prices extends to options where the IFB requires prices for the option items and provides that such prices will be evaluated to determine the awardee. Id. Failure to submit prices for the option items leaves the bidder with no obligation to provide the option items. Id. Accordingly, the mere acknowledgement of an amendment increasing the quantity of an item in a bid schedule is not sufficient to constitute a bid for the additional quantity. See Larry's Inc., B-230822, June 22, 1988, 88-1 CPD ¶ 599. Where the bid does not include a price for the increased quantity of an item added by an amendment, doubt exists not

only as to the intended price for it but also as to whether the bidder in fact has offered, in the bid as submitted, to obligate itself to provide the increased quantity. J.D. Bertolini Indus., Ltd., B-231598, Sept. 14, 1988, 88-2 CPD ¶ 245.

Here, EHRT submitted a bid for only 50 of the required 100 soil tests; it is not possible to determine from the face of its bid what its price for the added quantity would have been because EHRT's base bid for soil tests differed from its option bid for the 50 soil tests, which, in turn, did not reflect the actual quantity required by amendment No. 2.

To the extent EHRT now contends that its stated unit price for the lesser quantity of 50 soil tests represents its unit price for the additional quantity, a nonresponsive bid cannot be made responsive by explanations after bid opening. See BKS Constr. Co., 66 Comp. Gen. 492 (1987), 87-1 CPD ¶ 558. Allowing EHRT to explain its bid after bid opening would, in effect, give EHRT the advantage of electing to accept or reject the contract by choosing whether to make the bid responsive. See General Eng'g and Mach. Works, Inc., B-190379, Jan. 5, 1978, 78-1 CPD ¶ 9. Such a situation obviously would have an adverse impact on the integrity of the bidding process. Id.

EHRT also argues that the differences between the two bid schedule pages are negligible. To the extent that EHRT argues that its bid nevertheless should be accepted based on our decisions that a pricing omission may be waived, this argument fails. A pricing omission may be waived if the items added by an amendment are divisible from the original solicitation's requirements, are de minimis as to total cost, and clearly would not affect the competitive standing of bidders. See Leslie & Elliott Co., 64 Comp. Gen. 279 (1985), 85-1 CPD ¶ 212, aff'd, Ryan Elec. Co.--Recon., B-218246.2, Apr. 1, 1985, 85-1 CPD ¶ 366.

In Leslie & Elliot Co., supra, the bid omitted a price for an item added by an amendment to a construction contract. Since that item was found to be divisible from the overall contract requirements, we held that the bid defect could be waived. The defect in EHRT's bid, however, involves a price omission for an additional quantity of an item which is an integral part of the overall contract requirements. The agency states that the soil tests may be a prerequisite to other material performance items such as backfill of excavated sites or disposal of contaminated soils.¹ EHRT's

¹The agency reports that the soil tests are required by state and local regulations to determine whether excavated
(continued...)


failure to comply with the solicitation's amended quantity terms represents a material deviation from an essential requirement. See Larry's Inc., supra. Consequently, EHRT's bidding error may not be waived.

EHRT also argues that the contracting officer should have called attention to the mistake in the bid when he requested verification.¹ We think the adequacy of the verification by the contracting officer is irrelevant. Specifically, we have concluded that EHRT's bid was properly rejected as nonresponsive, and the mistake in bid procedures cannot be used to allow a bidder to correct a mistake that would make its bid responsive to the solicitation. See Federal Acquisition Regulation § 14.406-3.

EHRT finally argues that on several occasions an employee of the Army's contracting division assured EHRT it would be awarded the contract. EHRT states that in reliance on these statements, it allegedly expended funds in planning for contract performance, including scheduling employees and obtaining a performance and payment bond. There is no evidence that any statements by Army personnel could reasonably be construed as an inducement for EHRT to incur these costs before a contract was finalized. Rather, the record shows that EHRT took these actions on its own initiative. See Sevcik-Thomas Builders and Eng'rs Corp., B-215678, July 30, 1984, 84-2 CPD ¶ 128.

The protester's failure to bid on the required quantity for option item No. 7 rendered its bid nonresponsive. In view of our conclusion, we need not consider the protester's other arguments concerning its omitted price for option item No. 11.

Accordingly, the protest is denied.


for James F. Hinchman
General Counsel

¹(...continued)

soil meets the requirements for "clean fill." If the soil is "clean" it may be used as backfill; if not, it must be transported to an appropriate landfill.

²The Army's letter requesting verification asked that EHRT review its bid for accuracy and submit a written confirmation of its bid price.